



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

[REDACTED]

PRELIMINARY RECITALS

Pursuant to a petition filed June 15, 2015, under Wis. Admin. Code § HA 3.03, to review a decision by the Bureau of Long-Term Support in regard to a requested IRIS service component, a telephonic hearing was held on July 22, 2015, at Stevens Point, Wisconsin. At the request of the parties, the record was held open for the submission of consecutive briefs to DHA with copies to each other. The IRIS agency and petitioner's representative both timely submitted their briefs to DHA which are received into the hearing record.

The issue for determination is whether the IRIS program correctly denied the petitioner's request for an All-Terrain wheelchair and accessories because such second vehicle is not cost effective when other alternatives are available for petitioner's hunting, fishing, attending park events and other outdoor activities, and general access to community events.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Representative:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: [REDACTED], IRIS/TMG agency representative
Bureau of Long-Term Support
1 West Wilson Street
P.O. Box 7851
Madison, WI 53707

ADMINISTRATIVE LAW JUDGE:

Gary M. Wolkstein
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a [REDACTED] year old resident of Portage County.
2. The petitioner is a quadriplegic with spinal cord paralysis from C4-C6 as a result of a 2002 accident. He uses a power wheelchair for mobility. He requires assistance with all his activities of daily living (ADLs).
3. Prior to the 2002 accident, petitioner was an avid outdoorsman. He participated in bow and rifle hunting, fishing, and other outdoors activities with his family and his friends.
4. The petitioner has been enrolled in the IRIS program since April, 2011, and has an individualized service plan (Plan). IRIS is a self-directed personal care program, created by a Medicaid waiver. His IRIS monthly allocation amount was \$2,806.66 when he requested additional funding for the requested All-terrain wheelchair.
5. With his current power wheelchair, petitioner is permitted to hunt from his modified van on the side of the road using a DNR permit, and fish from designated handicap piers, docks, or piers.
6. The petitioner is able to use his current power wheelchair to attend events in parks or other outdoor activities which does not have uneven terrain, sand, woods, or wet areas, due to the wheelchair can becoming stuck.
7. During 2014, the Medicaid program paid about \$14,900 in repairs to his power wheelchair due primarily to the petitioner using his wheelchair in terrain for which the wheelchair was not designed. Much of the damage appears to be "caused by attempting to go on surfaces in which the power chair is incapable of handling" resulting in "uncustomary and inflated repair needs." See Department's written closing argument.
8. During April, 2015, the petitioner requested one-time payment, in addition to his monthly allotment, to pay for an Action Trackchair (All-terrain wheelchair) with accessories at a total requested cost of about \$13,555.00. See Exhibit D1 - D27.
9. The Department sent a May 1, 2015 notice to the petitioner denying his request for Medicaid funding an All-terrain wheelchair for the following reasons: a) the request is not the most cost effective way to support his outcome when other alternatives are available; b) his current power wheelchair provides access to many community and outdoor events without going on uneven or sandy terrain; c) the All-terrain wheelchair would be used for hunting, fishing and other outdoors recreational activities, but the petitioner currently has a DNR permit allowing him to hunt from his van on the road, and should allow him the capability to attend parks, carnivals and other outdoor activities; and d) the All-terrain chair is not needed to prevent institutionalization and would be a second power wheelchair for the petitioner.

DISCUSSION

The Include, Respect, I Self-Direct (IRIS) program was developed pursuant to a Medical Assistance waiver obtained by the State of Wisconsin, pursuant to section 6087 of the Deficit Reduction Act of 2005 (DRA), and section 1915(j) of the Social Security Act. This Section 1915(c) waiver document is available at <http://www.cms.gov/MedicaidStWaivProgDemoPGI/MWDL/list.asp>. IRIS is a fee-for-service, self-directed personal care program.

The federal government has promulgated 42 C.F.R. §441.450 - .484 to provide general guidance for this program. Those regulations require that the Department's agent must assess the participant's needs and preferences, and then develop a service plan based on the assessed needs. *Id.*, §441.466. The service plan may include personal care and homemaker services. *Id.*, §440.180(b). Further, "all of the State's

applicable policies and procedures associated with service plan development must be carried out ...” *Id.* §441.468.

I. JURISDICTION.

The first concern here is whether jurisdiction is present to review the IRIS Consultant Agency’s actions. The federal waiver document makes the following declaration regarding Medicaid fair hearing rights being applicable to IRIS agency actions:

The State provides an opportunity to request a Fair Hearing under 42 CFR Part 431, Subpart E to individuals: (a) who are not given the choice of home and community-based services as an alternative to the institutional care specified ... ; (b) **are denied the service(s) of their choice or the providers(s) of their choice**; or (c) **whose services are denied**, suspended, reduced or terminated. The State provides notice of action as requested in 42 CFR §431.210.

...
§1915(c) *Home and Community-Based Services Waiver*, Appendix F. In this case, the IRIS Consultant Agency has denied the petitioner’s request for an All-terrain wheelchair, so subject-matter jurisdiction is present.

II. DENIAL OF PETITIONER’S REQUEST FOR AN ALL-TERRAIN WHEELCHAIR

The federal self-directed personal assistance services rule requires that a state have an approved § 1915(c) waiver document before an IRIS-type program can be offered. 42 C.F.R. § 441.452(a). It does have a service category of “customized goods and services.” § 1915(c) *Home and Community-Based Services Waiver*, #0485R01.05., Appendix C-1, p.86. The Waiver’s requirements for approved services in this category include (1) that it meets an assessed long term support need, (2) that the support is not available through another source, and (3) that it will maintain the participant’s safety in the home/community *or* will decrease dependence on other Medicaid-funded services, *or* will maintain/improve the participant’s functioning related to the disability *or* **will increase the participant’s access to the community**. (Emphasis added).

The federal code language governing waiver programs such as IRIS allows for coverage of the following categories of services:

- (1) Case management services.
- (2) Homemaker services.
- (3) Home health aide services.
- (4) Personal care services.
- (5) Adult day health services.
- (6) Habilitation services.
- (7) Respite care services.
- (8) Day treatment or other partial hospitalization services, psychosocial rehabilitation services and clinic services (whether or not furnished in a facility) for individuals with chronic mental illness, subject to the conditions specified in paragraph (d) of this section.
- (9) Other services requested by the agency and **approved by CMS as cost effective and necessary to avoid institutionalization**.
(Emphasis added).

42 CFR § 440.180(b).

The relevant federal code also contains this language:

§441.482 Permissible purchases.

(a) Participants, or their representatives, if applicable, may, at the State's option, use their service budgets to pay for items that increase a participant's independence or substitute (such as a microwave oven or an accessibility ramp) for human assistance, to the extent that expenditures would otherwise be made for the human assistance.

(b) The services, supports and items that are purchased with a service budget must be linked to an assessed participant need or goal established in the service plan.

Id., § 441.482.

The Department's IRIS policy document, *IRIS Policy Manual (Manual)* available at <http://www.dhs.wisconsin.gov/publications/P0/P00708.pdf> (viewed in August 2014), does not provide further elaboration.

During the July 22, 2015 hearing and in his written closing argument, the petitioner explained he was and continues to be an avid outdoorsman. Prior to his 2002 accident, he participated in bow and rifle hunting, fishing, and other outdoors activities with his family and his friends. In this case, Disability Rights sent a July 14, 2015 letter on petitioner's behalf even though it is not representing the petitioner in this appeal. In that letter, Disability Rights argued that petitioner's request for the All-Terrain wheelchair should be approved under 1915(c) Home and Community Based services Waiver because the Action Trackchair relates to his relationships and community inclusion. The petitioner has made it clear that an all-terrain vehicle(ATV) would in his view improve the quality of his life by providing more access to rough or sandy outdoor terrain.

The Department representative agreed that hunting from the road in his modified van (using the DNR permit) would limit the variety of locations from which the petitioner could hunt. However, the Department correctly asserted that petitioner can still continue to hunt, has access to this community, and partake in outdoor activities in a much more cost-effective manner. In addition, [REDACTED] is able to fish from designated handicap piers, docks and boat ramps. While it is true that those locations may not be the petitioner's preferred locations from which to fish, he nevertheless is able to fish in those locations. Furthermore, many concert or parks have paths which would provide a solid footing for the use of his current power wheelchair without resulting in needed repairs and without getting stuck in mud or sand. While once again this creates some restrictions in where he would go in a park or outdoor area, he does have access to parks and community events.

It is understandable that petitioner wants to also go on sand beaches or uneven terrain. However, the Department responds that it is not cost effective for the MA program to pay for a \$13,555 vehicle (as a second power vehicle) to allow petitioner access to those additional outdoor areas, when he already has access to many community or recreational activities. The petitioner was unable to provide any legal or policy authority to establish that he has the right to MA payment for the requested All-Terrain vehicle to extend his recreational activities.

Perhaps, for some special occasions, a friend or family member might take the petitioner on a two seater all-terrain vehicle (or loan him that ATV) so that petitioner could enjoy areas not accessible to his power wheelchair. In the petitioner's August 3, 2015 written closing argument, petitioner's representative provided various responses to the Department's persuasive July 28, 2015 closing argument as to why the requested ATV should be approved. The arguments in the petitioner's closing argument were not convincing. Accordingly, based upon the above, I conclude that the IRIS program correctly denied the

petitioner's expense funding request for an All-Terrain wheelchair and accessories because such second vehicle is not cost effective when other alternatives are available for petitioner's hunting, fishing, attending park events and other outdoor activities, and general access to community events.

CONCLUSIONS OF LAW

The IRIS program correctly denied the petitioner's request for an All-Terrain wheelchair and accessories because such second vehicle is not cost effective when other alternatives are available for petitioner's hunting, fishing, attending park events and other outdoor activities, and general access to community events.

THEREFORE, it is

ORDERED

The petition for review herein be and the same is hereby Dismissed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

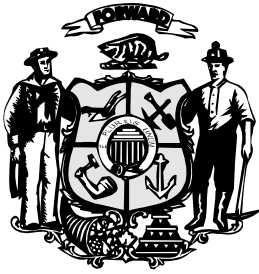
APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 14th day of September, 2015

\sGary M. Wolkstein
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on September 14, 2015.

Bureau of Long-Term Support